In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-705

FIRST STATE BANK OF CROSSETT, ARKANSAS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In August 1967, Sutton Construction Company ("Sutton") executed an accounts receivable security agreement with petitioner. Under this agreement, petitioner was assigned, as security for existing or future loans, all of Sutton's accounts receivable arising during the term of the agreement. However, petitioner did not file its security agreement with the Arkansas Secretary of State or with the Clerk of the Circuit Court, the offices designated by the Arkansas Uniform Commercial Code. See Uniform Commercial Code, Ark. Stat. 1947, Ann. (1961 Addendum), Section 85-9-401(c) (Pet. App. A2-A3). In June 1968, Sutton entered into contracts with the Sewer Im-

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provement District No. 2, McGehee, Arkansas, and the City of Hope, Arkansas, to construct sanitary water and storm sewer improvement facilities (Pet. App. A2). In late 1968, Sutton directed both Arkansas municipalities to make future payments due under the construction contracts payable jointly to petitioner and Sutton. Relying on the security agreement and these written directions, petitioner advanced approximately $15,000 to Sutton to pay for labor and to purchase materials for use in performing the contracts. At the time the present proceeding was instituted, Sutton remained indebted to petitioner in the amount of $13,919.41.

For each taxable period between March 31, 1968, and March 31, 1969, Sutton failed to pay over to the United States employee withholding and F.I.C.A. taxes. Because of this failure, the United States served a notice of levy upon the sewer improvement district of McGehee, Arkansas, and received the sum of $10,763.59, representing progress payments due Sutton for work performed between February 11 and March 1, 1969. Similarly, the United States served a notice of levy upon the City of Hope, Arkansas, and received the sum of $8,336.16, representing progress payments due Sutton for work performed from February 1 to March 7, 1969 (Pet. App. A3).

Petitioner then brought the present suit in the district court, pursuant to Section 7426 of the Internal Revenue Code of 1954, 26 U.S.C. 7426, to recover those progress payments, claiming that they had been wrongfully levied upon by the United States (Pet. App. A15–A16). The district court held that petitioner

as assignee had first priority to the funds and was entitled to $17,328.87 of the amount levied upon by the United States (Pet. App. A19–A28, A33).

The court of appeals, in a thorough opinion on which we rely, reversed, holding that the federal tax liens took priority over the bank's security interest (Pet. App. A4–A10).[1] We add only that, contrary to

[1] There were three competing sets of claimants to the progress payments: (1) the United States, under its liens and levies for Sutton's unpaid payroll taxes; (2) petitioner, under an earlier unrecorded assignment of accounts receivable; and (3) three individuals, T. C. Trigg, Ovid Switzer and Victor Scott, who agreed to indemnify Sutton's surety and who claimed priority as subrogees of mechanic's lienors and as successors in interest to the surety (Pet. App. A1–A2).

Sutton defaulted on its contracts with McGehee and the City of Hope in April 1969, whereupon the surety was called upon to complete performance. The surety, in turn, demanded that the three indemnitors hold it harmless. Pursuant to the surety's demands, the indemnitors paid previously unpaid material and labor claimants and secured a second contractor to complete the projects (Pet. App. A3–A4).

The indemnitors were also plaintiffs in the proceeding against the United States (Pet. App. A15). Since the district court's determination in favor of petitioner did not exhaust the full amount of the progress payments plus interest, the district court also ruled on the relative priorities of the United States and the indemnitors to the remainder of the fund, and awarded second priority to the indemnitors to the balance of the fund in the amount of $4,328.67 (Pet. App. A4, A28–A32, A33). The indemnitors cross-appealed from the district court's determination.

In reversing the district court, the court of appeals held that the United States was entitled to priority over the claims both of petitioner and of the indemnitors and, therefore, was entitled to the total amount of the progress payments. Accordingly, the court did not reach the question of the relative priorities between petitioner and the indemnitors (Pet. App. A4). The indemnitors have not filed a petition for a writ of certiorari.

petitioner's contention, there is no conflict among the courts of appeals. The decision below turns primarily upon a construction of Arkansas law, whereas the decisions cited by petitioner (Pet. 8–9) rested upon the laws of other States. Furthermore, those decisions did not involve the precise issue presented here, for they were concerned with either the validity of a security interest as between the parties to the security agreement or, *In re Halprin*, 280 F. 2d 407 (C.A. 3), the assignment of accounts receivable without even the retention of a right to joint receipt of contract proceeds.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

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